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Federal Communications Commission
Office of the Secretary

In the Matter of

The Telephone Consumer
Protection Act of 1991

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CC Docket No. 92-90

REPLY COMMENTS OF OLAN MILLS, INC.

Thomas W. Kirby
James T. Bruce, III
Paul C. Smith
Rachel J. Rothstein
of
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

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Summary

Almost 200 parties filed comments in response to the Commission's NPRM. The comments overwhelmingly demonstrate that a company specific do not call ("DNC") mechanism would best allow the Commission to fulfill its statutory mandate under the TCPA without unduly burdening legitimate telemarketers and other entities. Furthermore, the DNC approach would be most consistent with the public's needs and expectations. Consumers would have the choice to discontinue unwanted solicitations, while continuing to receive information from favored companies. Finally, their decision to block certain future calls would be implemented quickly.

The comments also demonstrate that other proposals contained in the Commission's NPRM are not practical and would not promote the public interest. A national database would be a costly and burdensome measure, and would not allow consumers any real choice in which companies call them. A special directory marking system, as demonstrated by the LECs Comments, would also prove to be costly, slow, and would impose significant hardships on the carriers responsible for directory publishing.

Finally, Olan Mills urges the Commission to refrain from adopting further exemptions from the Act. A "de minimis" exemption from the live operator solicitation rules would seem impermissible under the statute, and would not result in

any additional benefits for consumers. Furthermore, the Commission's proposed exemptions to the provisions on commercial automatic calling appear to be at odds with the stringent statutory limitations on such exemptions.

Olan Mills urges the Commission to carefully consider all of its proposed options and to enact a flexible DNC mechanism to protect residential telephone subscribers from receiving solicitations to which they object.

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Olan Mills, Inc. ("Olan Mills"), by its attorneys, hereby submits its reply comments in the above-captioned proceeding.¹ The majority of the parties submitting comments to the Commission favor an approach that would place the responsibility for creating and maintaining systems to assure telephone subscriber privacy upon the telemarketing industry, rather than on the local exchange carriers or independent parties. Furthermore, as demonstrated by the comments, many of the Commission's proposed alternatives would be either ineffective in protecting subscriber privacy rights or prohibitively costly.

The overwhelming majority of parties favored Commission adoption of a company specific do not call ("DNC") option. Olan Mills agrees that this approach, while unquestionably a hardship on some companies engaged in telemarketing, would best allow the Commission to meet its statutory goals in an efficient and effective manner without being unduly

1 Telephone Consumer Protection Act of 1991, CC
Docket No. 92-90 (rel. April 17, 1992) [hereinafter "NPRM"].

burdensome on the industry, the telephone companies or the public.

I. Summary of Comments

About 200 parties filed comments in response to the Commission's NPRM. Of these parties, all but a handful recommended that the Commission adopt a company-specific DNC mechanism to protect subscribers from receiving telephone solicitations to which they object. For example CUC International, commented "[s]uch a requirement would strike the appropriate balance between sufficiently protecting consumers' privacy interests while allowing companies to reach consumers who wish to take advantage of telemarketed goods and services."²

Of the remaining commenters, a few parties suggested that a national database would be the most appropriate option for the Commission to fulfill its mandate. Some of these commenters also expressed their interest in creating and developing the system. While Olan Mills would welcome a detailed discussion of the implementation of a national database, the comments were wholly devoid of such specifics. Several consumer organizations submitted comments suggesting that the Commission should seek to end all telemarketing,³

² Comments of CUC International at 8.

³ See Comments of Robert S. Bulmash at 5.

and that a national database may best effectuate this goal. However, based on the limitations contained in the statute, such a result is clearly not possible nor intended.⁴

Several parties also addressed the Commission's apparent confusion concerning the appropriate technological terminology for automated dialing equipment. These parties urged the Commission to clarify that the prohibitions discussed in the NPRM⁵ apply only to solicitations utilizing automated dialing equipment in conjunction with an artificial or prerecorded voice, and not to live operator solicitations using automated dialing equipment. While the rules proposed by the Commission seem consistent with this approach, the NPRM often uses the term "auto dialer" as synonymous with dialing devices used in conjunction with prerecorded solicitations. Olan Mills is confident that the Commission will clarify its rules to remain consistent with Congress' intent.

⁴ The statute specifically exempts from the Commission's rules solicitations made by charitable, political and non-profit institutions and market surveys. See Pub. L. No. 102-243, § a(3), [hereinafter "TCPA"].

⁵ NPRM at 3.

II. A COMPANY SPECIFIC DO NOT CALL MECHANISM WOULD BEST ALLOW THE COMMISSION TO FULFILL ITS OBLIGATIONS UNDER THE ACT

A. The Comments Overwhelmingly Support a Company-Specific Do Not Call Approach

The Commission's NPRM sought comments on five mechanisms which it believed might be useful in fulfilling its mandate under the TCPA. Of these alternatives, the comments overwhelmingly favor the adoption of a company-specific DNC approach. This system would provide an efficient method for telemarketers to end solicitations to consumers who do not wish to receive them, while promoting consumer choice.

Many of the commenting parties discussed their experience with DNC lists.⁶ These parties have already voluntarily undertaken the expense necessary to develop these systems, and believe that if all telemarketers were forced to implement DNC lists, subscribers would be sufficiently protected from unwanted solicitations. Furthermore, the benefits associated with this system far outweigh the significant burdens and costs associated with the other Commission proposals.

There is no question that a DNC mechanism is the most "economical and consumer-result oriented approach to

⁶ See Comments of ITI Marketing Services at 2, Comments of JBlenkarn Systems at 1; Comments of King Teleservices at 2.

addressing concerns about unwanted telephone solicitations."⁷ This is because the costs associated with implementation of the system are directly proportional to the amount of soliciting engaged in by the company. Small companies will not be forced to undertake unnecessarily large capital investments in order to comply with the Commission's rules. They remain free to develop a system that would reflect their individualized business needs. In addition, this system would place the costs -- and the burden of compliance -- on the telemarketer, rather than on the LEC or an independent third party.

Furthermore, a company-specific DNC promotes consumer choice. Consumers would have the right to discontinue solicitations from certain companies, while continuing to receive solicitations from favorite entities. Other systems proposed by the Commission present an all-or-nothing approach for consumers, and seem overbroad considering the amount of sales generated last year by telemarketing.⁸ Obviously, many consumers choose to purchase goods and services as a result of telephone solicitations from certain companies. The DNC approach would allow the Commission to foster this choice, while allowing other consumers to end selected unwanted solicitations.

⁷ Comments of American Telemarketing Association ("ATA") at 2.

⁸ As recognized by Congress, unsolicited sales calls generated \$435,000,000,000 in sales in 1990. TCPA at § 2.

Finally, a DNC list would allow a telephone subscriber's choice to be effectuated almost immediately. Once a consumer indicates his desire to discontinue further solicitations, there is no reason why a telemarketer cannot implement it in a realistic timeframe. Even if the DNC list is maintained by a corporate central office to which local offices report, it is unlikely that the DNC approach would result in the time lags associated with other Commission proposals.

Olan Mills urges the Commission to consider the benefits of a DNC system. These three factors -- least burden on commerce, consumer choice, and timing -- make the DNC approach the most attractive of all the mechanisms proposed to protect telephone subscriber privacy rights.

B. IMPLEMENTATION AND COMPLIANCE WITH A DNC SYSTEM

1. The Olan Mill's DNC System

While the comments submitted in this proceeding overwhelmingly favor a company-specific DNC mechanism, some of the parties did not discuss the specifics of the system or how it could be successfully implemented by the Commission. One attractive feature of the DNC approach is that it can be individually tailored to meet the needs of each specific company, thereby relieving the Commission from having to enact overly strict, technical requirements. Olan Mills

believes that the Commission should have an understanding of the details of such a system in order to be assured that this approach can successfully protect residential telephone subscribers' rights to privacy.

Olan Mills has utilized a DNC system for 16 years. The system was established as a response to some consumers' desires to be free from unwanted solicitations by the company. While Olan Mills' believes that many consumers want to hear information regarding its products, it is good business etiquette to refrain from contacting consumers who are not interested in making purchases from the company. Olan Mills believes that the DNC mechanism best fulfills these goals.

Olan Mills currently utilizes two systems to conduct its telemarketing campaigns. The larger studios utilize a computerized system, while operators in the smaller studios are provided hard-copy lists of names and telephone numbers. The computer printouts have various categories of call results which are coded by the Olan Mills' employee. One of the call result categories is placement on the Olan Mills DNC list. In order for a consumer to be added to the DNC list, he must express a desire not to be called again in the future. There are no "magic words" that are required by the consumer, any specific request from the consumer that the company should not call again in the future is sufficient.

Periodically, the computerized sheets are returned to Olan Mills' main computer facility in Chattanooga, Tennessee, where the names on these sheets are aggregated on a master computer list. When the company purchases a new marketing list,⁹ the computer will run the list against Olan Mill's DNC list, and suppress the names which appear on the DNC. Thus, the operators in Olan Mills' studios will never see the names of the consumers who asked not to be called again, because their names will be deleted from the marketing list sent to the studio.

In smaller studios that are not "on line" with the main computer facility the process is even simpler. Consumers who ask not to be called again are coded and this code remains on the hard copy in order to prevent future calls. Because each studio has an exclusive area to serve, each individual office need only consult its own in-studio Do Not Call list. Gradually, Olan Mills will convert these studios to computers as well.

Olan Mills' solicitations are conducted by company employees. These employees are trained by Olan Mills, including how the DNC mechanism works. While Olan Mills often uses computers for its DNC system, computers are not

⁹ As discussed in its comments, Olan Mills' marketing lists are compiled from public records and do not include non-published phone numbers.

necessary to implement this approach. Small telemarketers can simply generate hand-written lists or keep file cards.

The experience of Olan Mills is that the company-specific do not call system is relatively inexpensive to maintain and operate. The company's total annual costs for updating and maintaining this system is estimated to be \$41,000. This works out to a cost of 11 cents for each DNC record per year.¹⁰

2. Compliance with Commission Rules

Should the Commission adopt regulations to effectuate a company-specific DNC mechanism, it would need to specify minimal requirements for such a system and adopt procedures to ensure that companies adequately comply with the Commission's mandate. The Commission should also write the regulations in a manner such that compliance with the Commission's rules will constitute "reasonable practices and procedures" in accordance with Section 228 c(5) of the TCPA. This will ensure that telemarketers who comply with the Commission's rules will be accorded an affirmative good-faith defense to any actions brought against them.

¹⁰ This cost figure was calculated by first determining the total cost to the company of maintaining and updating all its phone records. Second, the percentage of all such phone records attributable to the Do Not Call system was determined. Finally, this percentage was applied to the total cost to the company of maintaining and updating all its phone records.

Olan Mills suggests that the Commission require telemarketers to file annually with the Commission a letter of certification that the company is in full compliance with the regulations. In addition, telemarketers should file with the Commission a copy of their written corporate guidelines on establishment of the DNC, which would include a policy of keeping DNC numbers for two years. Of course, the Commission retains authority under the TCPA to conduct audits and investigations of companies subject to the Act.

III. THE COMMENTS DEMONSTRATE THE UNDESIRABILITY OF THE OTHER COMMISSION PROPOSALS

A. A National Database Would Not Promote the Public Interest

Only a handful of parties asked the Commission to consider the adoption of a national database. Unfortunately, none of these parties seem to present a cohesive and detailed description of how such a database might be established or operated. Furthermore, while at least one of the commenters would be interested in implementing the system, its comments lack specific cost estimates for its creation, or how these costs would be apportioned among the various types and sizes of telemarketers. Indeed, some of the commenters expressed

doubt as to whether they could even comply with such a system.¹¹

The comments indicate that the costs of establishing a national database would be exorbitant. AT&T estimates that the database could cost between \$24 and \$80 million, depending on the complexity of system.¹² Household International believes that the costs "would be at least \$50 million, and may reach up to \$100 million."¹³ Even the Commission estimated that a national database could cost up to \$6 million to implement.¹⁴ The Commission would need to devise a mechanism to ensure that these costs are recovered in a way that does not unfairly burden small companies engaged in limited amounts of telemarketing.

Many companies and individuals engaged in telemarketing will also be required to make additional investments in both equipment and human resources for individual compliance. These costs will inevitably be passed on to consumers in the form of higher prices for goods and services.

¹¹ See Comments of Avon; Comments of Amway Corporation at 3.

¹² Comments of AT&T at 12.

¹³ Comments of Household International at 12.

¹⁴ See Telephone Advertising Consumer Rights Acts, Rpt. No. 102-317, 102d Cong., 1st Sess. (1991) at 22.

B. The Proposals Submitted in Favor of the National Database Lack Sufficient Details

The comments in favor of a national database do not provide sufficient information to adequately assess this proposal. For example, InterVoice suggests that the Commission implement a licensing scheme "whereby all telemarketing organizations must petition to the FCC for a license to conduct their telemarketing operations," making monthly subscription to the database a condition of maintaining the license.¹⁵ InterVoice recognizes, however, that implementation of the database "might be an onerous task and an expensive proposition if not properly implemented," but fails to provide any cost estimates for creating and establishing a national database.¹⁶

InterVoice's comments, however contain significant areas of concern for the Commission and for telemarketers. To begin with, the TCPA does not give the Commission the jurisdiction to license companies engaged in telemarketing. Furthermore, the Commission's authority to regulate common carriers under Title II of the Communications Act does not extend to telemarketers and the millions of other business and residential telephone customers who merely use the telephone services that common carriers provide. While the

¹⁵ Comments of InterVoice, Inc. at 9.

¹⁶ Id. at 8.

Commission has power under Title I to regulate forms of "interstate and foreign communications by wire or radio" not expressly addressed elsewhere in the Act, such authority extends solely to matters "reasonably ancillary" to effectuating the Commission's expressly delegated responsibilities.¹⁷ No such nexus exists here. The activities of telemarketers affect neither the availability of telephone services nor the terms and prices upon which such access is provided.

Even if one were to assume that, in theory, a licensing scheme might be devised that falls within the Commission's Title I authority, the actual implementation of such a scheme in an area wholly unaddressed by the Communications Act would necessarily lead to resource-consuming delay. Protracted legal challenges could be expected, similar to what invariably arises from major regulatory initiatives based solely on ambiguous statutory language.¹⁸

Moreover, the Commission's current financial and administrative limitations would preclude it from undertaking the daunting task of implementing from scratch an effective

¹⁷ See United States v. Southwestern Cable Co., 392 U.S. 157, 172 - 78 (construing 47 U.S.C. § 152(a)); see also FCC v. Midwest Video Corp., 440 U.S. 689, 706 (1979) (Commission "not delegated unrestrained authority;" authority recognized in Southwestern Cable was only that "necessary to ensure the achievement of the Commission's statutory responsibilities").

¹⁸ See, e.g., Midwest Video.

nationwide licensing scheme for telemarketers. In sum, given the current limitations on the Commission, both legally and financially, it is doubtful that, as a practical matter, a comprehensive, nationwide licensing scheme of the sort that InterVoice apparently envisions could effectively be implemented.

LeJeune Associates also advocates adoption of a national database, asserting that based upon the Florida experience, "a database system can achieve virtually all of the goals of the TCPA . . . and can be funded through modest charges to telemarketers. . . ." ¹⁹ The proposal advocates Commission selection of a database administrator through a request for proposal ("RFP") process. Consumers could be notified of the database on the LEC billing statements, through press releases, and by other publicity efforts undertaken by the database administrator. ²⁰ LeJeune also states its interest in administering the database system. ²¹

Unfortunately, LeJeune fails to provide any cost estimate for the creation and establishment of a national database. While it projects revenues of \$2.5 million for sale of the lists to telemarketers, it does not predict the annual expenditures necessary to maintain the system. In

¹⁹ Comments of LeJeune Associates of Florida at iv.

²⁰ Id. at 22.

²¹ Id. at 20.

addition, Olan Mills is unsure whether LECs could modify their billing systems to include additional messages on local subscriber bills, and how the costs for such modifications would be recovered. Finally, the issuance of an RFP seems inconsistent with the Commission's finding that the database should not be a government-sponsored institution.²²

Several consumer groups also believe that a national database would best protect consumer's privacy rights. The Center for the Study of Commercialism suggests that the Commission establish a national database of consumers who want to receive telephone solicitations -- a do call list. The burden of "signing up on the list would fall only on those consumers who do wish to receive sales calls."²³

Olan Mills submits that such an approach would not conform to the requirements of the TCPA. The statute directs the Commission to initiate a proceeding and prescribe regulations "concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object." Under the proposal, consumers would not have an opportunity to object, rather they would have to decide which calls to accede to without knowing what the calls are. Privacy Times also advocates a national database system, although its comments

²² See NPRM at 13.

²³ Center at 11.

are wholly devoid of any factual analysis on implementation of such a system or its associated costs.

The National Consumers League ("NCL") recommends that the change of address information collected by the U.S. Postal Service can be used by consumers to indicate their desire to discontinue telephone solicitations. NCL advocates that the U.S. Postal Service add to the form information regarding the database and then allow consumers to indicate on the card their desire to be included in such a system.

Olan Mills has significant concerns about NCL's proposal. NCL does not provide details on how this system would be implemented. Would the change of address cards be forwarded to the database administrator for inclusion in the system, or would the Post Office be responsible for compiling a list of address holders who want to be in the telephone database? Furthermore, the U.S. Postal Service allows its change of address forms to be sold to commercial entities for marketing purposes. The TCPA, however, prohibits the use of a national database for commercial purposes.²⁴ Therefore, use of the U.S. Postal Service change of address system may result in inappropriate use of this information.

Consumer Action suggests that the FCC authorize creation of a National Telemarketing Center ("NTC") which would be governed by industry and consumer representatives. The NTC

²⁴ TCPA at C(3)(k).

would be responsible for creating and implementing a national database. Companies would then be required to submit all of their telemarketing lists for comparison against the Center's database of consumers objecting to telephone solicitations. The cost of the searches would be borne by the telemarketer.

While this proposal is creative, Olan Mills does not believe that it represents a workable option for the Commission. First, substantial Commission involvement is a prerequisite to authorizing and creating the NTC. The Commission, however, has already indicated its desire to adopt procedures that would be the least burdensome on the Federal Government. Next, the telemarketing industry is comprised of an extremely diverse range of companies. It would be difficult to appoint individuals to manage the NTC who accurately represent the industry. Finally, a requirement that every company or individual engaged in telemarketing submit their marketing lists to the Center for prior clearance would be overly burdensome and will result in companies experiencing significant delays in conducting their marketing campaigns.

Very few parties support Commission adoption of a national database mechanism. And, the comments advocating this approach fail to provide a detailed discussion of the significant costs that such a system will place on telemarketers and the inherent complications associated with

its development. Indeed, the absence of detail in the proposals evidences the difficulty in developing answers to key questions, such as how the administrator would be chosen or how the costs would be apportioned among the various types and sizes of companies that engage in telemarketing. The database option is fraught with unreasonable costs and burdens and should not be implemented by the Commission.

C. Other Alternatives Proposed by the Commission Are Not Feasible

1. The Comments Demonstrate that Special Directory Markings Would Prove Unworkable

Another of the Commission's proposals involve the development of special markings in the local telephone directories to indicate a consumer's desire to refrain from telephone solicitations. The comments demonstrate, however, that this mechanism would prove unworkable for telemarketers conducting businesses on a nationwide basis and that the costs associated with such a system would be significant. Finally, this mechanism would most likely prove disappointing to many consumers because of the time lag inherent with a system that will only be updated on an annual basis.²⁵

²⁵ See Comments of Pacific Bell and Nevada Bell at 13; Comments of GTE Service Corporation at 16.

As noted by GTE, a directory markings system was "tried in Florida and proved ineffective."²⁶ Telemarketers use a variety of sources to develop their marketing lists and frequently do not consult local telephone directories. In addition, telephone directories "cover a finite geographic area that may not match the geographical area of the telemarketing campaign."²⁷ Thus, even primarily local telemarketers may be forced to check their marketing lists against several directories.

Based on the comments, the costs and administrative burdens associated with development of a special directory marking system would be substantial. NYNEX, for example, indicates that a special directory marking requirement would be "problematic,"²⁸ and would force the LECs to engage in detailed and costly procedures such as reprogramming service order systems and developing procedures to update, revise and store the lists.²⁹ Bell Atlantic estimates that the costs to develop a directory marking option could amount to \$70 million during the first year.³⁰ These costs would most

²⁶ Comments of GTE at 16.

²⁷ Id.

²⁸ Comments of NYNEX Telephone Companies at 10.

²⁹ Id. at 10-14.

³⁰ Comments of Bell Atlantic Telephone Companies at 6.

likely fall on the LECs, since they are primarily responsible for publishing the directories.³¹

2. Network Technologies Cannot Currently Support Telemarketer Specific Blocking

The comments also indicate that network technologies, which may allow the Commission to successfully protect consumers from unwanted telephone solicitations, do not yet exist. Indeed, it is significant that all of the local and interexchange carriers submitting comments in this proceeding indicated their belief that the network does not have the capacity to implement subscriber blocking.

For example, GTE stated that "it is not clear that the North American Numbering Plan has sufficient resources" to allow for a telemarketing specific prefix.³² PacTel discusses the inability of the current network to allow selective call blocking on a prefix basis, as well the lack of ubiquitous CLASS type features in the telephone network.³³ AT&T states that the network technology proposal "is not technically viable at this time and is overly restrictive."³⁴

³¹ See Comments of Pacific Bell and Nevada Bell at 14.

³² Comments of GTE Service Corporation at 15.

³³ Comments of Pacific Bell and Nevada Bell at 13.

³⁴ Comments of AT&T at 15.